1, 1888, the Association has increased its membership by 120 new members, 75 joining during the month of January, and 45 during the months of February and March."

STATES AND TERRITORIES REPRESENTED.

| | No. of Members. | | No. of Members. | | No. of Members. |
|---|---|---|---|---|---|
| Alaska | 1 | Louisiana | 1 | Pennsylvania | 11 |
| Alabama | 1 | Maine | 13 | Rhode Island | 8 |
| Arkansas | 1 | Maryland | 8 | Tennessee | 2 |
| California | 11 | Massachusetts | 409 | Texas | 5 |
| Colorado | 9 | Michigan | 11 | Vermont | 2 |
| Connecticut | 6 | Minnesota | 11 | Virginia | 1 |
| Dakota | 2 | Mississippi | 1 | Washington Territory | 1 |
| Delaware | 4 | Missouri | 22 | West Virginia | 1 |
| District of Columbia | 15 | Montana | 2 | Wisconsin | 3 |
| Georgia | 2 | Nebraska | 1 | | |
| Illinois | 18 | New Hampshire | 7 | New Brunswick | 10 |
| Indiana | 3 | New Jersey | 4 | Nova Scotia | 5 |
| Iowa | 2 | New York | 89 | France | 1 |
| Kansas | 1 | North Carolina | 1 | United States of Colombia | 1 |
| Kentucky | 6 | Ohio | 47 | | |
| | | Oregon | 1 | | |
| Total | | | | | 761 |

STATES AND TERRITORIES UNREPRESENTED.

| | | |
|---|---|---|
| Arizona, | New Mexico, | Wyoming. |
| Florida, | South Carolina, | |
| Nevada, | Utah, | |

# THE LAW SCHOOL.

## IN THE MOOT COURT.

*Coram* GRAY, J.

*Bond* v. *Selwyn.*

The acquisition by prescription of a right of way over land is not prevented by orders or threats on the part of the owner of the land against the use of the way, if such orders or threats are not complied with or yielded to.

TRESPASS QUARE CLAUSUM. The time of trespass alleged was January 11, 1887, with a *continuando*. The plaintiff and defendant owned adjoining parcels of land. The defendant in 1876 began to cross the plaintiff's land by a defined path from his own land to the highway, and continued, openly and constantly, to use the path till the date of the writ, October 20, 1887.

The plaintiff repeatedly told the defendant that he must not use the path; that the plaintiff forbade him to use it; that the defendant was a trespasser; and that he would sue the defendant for trespass in using the

path. But the plaintiff never prevented the defendant, or attempted to prevent him, by physical force, from using the path, nor did he ever obstruct it, nor, until this suit, had he brought any action against the defendant.

The Statute of Limitations to suits for the recovery of land is ten years.

On the facts above stated, which were not in dispute, the judge directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

*W. H. Cowles* and *L. P. Frost*, for the Plaintiff.

*H. H. Johnson* and *H. N. Castle*, for the Defendant.

GRAY, J. Statutes providing for the acquisition of easements by lapse of time are comparatively modern. The claim to an easement could always be supported by immemorial prescription, but when, by 3 Edw. I. *c.* 39, it was enacted that in a writ of right none should declare of the seisin of his ancestors prior to 1189, the courts, by analogy to that statute, held that the enjoyment of an easement from before that year would give a good title.

When the 32 Henry VIII. *c.* 2, shortened the time which would bar a writ of right to a period of sixty years before the *teste* of the writ, the courts did not shorten the time for acquiring an easement accordingly, but the year 1189 still remained the date from which such time was to be reckoned.

Later, indeed, it was held that the enjoyment of an easement for twenty years raised a presumption that it had existed from 1189. But this presumption was rebuttable, and could often be easily rebutted.

To take away, however, a right which had been enjoyed perhaps two hundred years because it could be shown that it had not existed five hundred years, was not to be endured. The judges escaped this result by instructing juries, that if a man had enjoyed an incorporeal hereditament for twenty years, they might presume that he had received a grant of it which had been lost. This was at first a mere presumption of fact, which juries might disregard if they pleased. It was gradually hardening in England into a presumption of law, when the Prescription Act of 2 and 3 Wm. IV. *c.* 71 (1832) was passed. In *Angus* v. *Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162; 6 Ap. Cas. 740, a question arose which had slipped through the meshes of this Act, and had to be decided without its aid. The great majority of the judges in that case were of opinion that the presumption of a lost grant raised by twenty years' enjoyment was a presumption of law. As might be expected when a legal conception has been passing through such a transition, the language of judges and writers concerning it is vacillating and confusing.

In this country the time held necessary to raise a presumption of a lost grant has generally followed every change in the Statutes of Limitations; the nature and effect of personal disabilities in determining questions of prescription have been borrowed from those Statutes; and several courts have of late rejected the doctrine of a lost grant, and declared that the presumption of such a grant is an unnecessary fiction; that though it might once have had its use as a scaffolding before the modern doctrine of prescription was established, it is now to be considered settled that the statute provisions as to the limitation of actions

for the recovery of land are to be extended, so far as applicable, to the acquirement of incorporeal rights by prescription; and that the doctrine of a lost grant is a stumbling-block, which is best out of the way. These cases have met with general acceptance, and represent, I think, the law of the United States to-day. *Wallace* v. *Fletcher*, 10 Fost. 434; *Tracy* v. *Atherton*, 36 Vt. 503. Even if the theory of a lost grant is still to be perpetuated, the law in this country is now that the presumption of such grant is a legal presumption, and that no evidence can be introduced that in fact such grant was never made.

This conclusion disposes of some of the cases cited for the defendant, such as *Nichols* v. *Ayler*, 7 Leigh, 546, which go upon the ground that the presumption is one of fact; but it does not dispose of the whole case.

I have said that the law arising under the Statute of Limitations is to be extended, *so far as it is applicable*, to cases of the acquirement of easements; but the question remains, how far it is applicable; corporeal and incorporeal rights are not identical, and it may not be possible to apply the rules which govern the one class to the other.

The ordinary form of the Statute of Limitations is that no one shall bring an action to recover land or make an entry thereon more than twenty years after the right of action or entry accrues. Here, of course, threats and complaints by a disseisee will not stop the running of the Statute against him. The right to bring an action first accrued to him when he was disseised, and this fact is unaffected alike by his holding his tongue, or by his threats. Whether he is silent, or whether he complains and threatens, is immaterial, except so far as the complaints and threats tend to rebut any notion that the holding is by license.

But no action will lie by the owner of a servient tenement to recover an easement over his land, nor can he make any entry upon such easement. He is already seised of the land over which the easement is exercised, and therefore it does not seem conclusive against the proposition that threats will interrupt the acquisition of an easement, that they will not stop the running of the Statute of Limitations.

The real question seems, in applying the rules of the Statute of Limitations to cases of prescription, to be this: What acts amount to an interruption of the possession of an easement, corresponding to an interruption of the possession of a freehold? To stop the running of prescription, there must be a dispossession of the person exercising the easement from the right which he is exercising.

Some learned persons have denied that there can be any true possession of easements; but this seems to overlook the fact that the only things of which we have legal possession are rights. The things which we can hold in our hands are very few, and in extending the idea of possession beyond such things it must be referred to the power and intention to exercise rights, and it makes no difference whether they be single rights like rights of way, or the bundles of rights which constitute the rights in a corporeal hereditament.

For a man to have possession there must be (1) a desire on his part that persons generally may not do anything concerning a material object which is inconsistent either with his doing any act concerning that thing, or with his doing certain specified acts concerning that thing; (2) there must have been some outward act on or touching the thing

sufficient to indicate that desire (what such act shall be is often highly conventional); (3) there must be no act done by a third person which is inconsistent and intended to be inconsistent with the fulfilment of such desire.

Now, here the defendant's desire was that no one should do anything concerning a strip of land which was in any way inconsistent with his going how and when he pleased over it, and he had indicated this in the ordinary way by walking over the strip when and how he pleased.

Did the plaintiff do anything which was inconsistent with the defendant's going when and how he pleased over the strip? If he had placed a physical obstruction there, he would have done something inconsistent with the defendant's using the way as he pleased; so if he had frightened him off, for then his fears would not have allowed him to use it. But here that the threats were not inconsistent with his going how and when he pleased appears from the fact that he continued to go how and when he pleased.

I therefore think that there was no dispossession or interruption of the defendant's exercise of his easement. Another line of thought leads to the same conclusion. Nothing can be an interruption preventing the acquisition of a right of way unless it would be an actionable disturbance of a right of way already acquired. Suppose the defendant in this case had had a way by grant over the land of the plaintiff, and the plaintiff had done as he has done now, his conduct would not have amounted to a disturbance of the way for which an action would have lain.

For these reasons I am of opinion that the easement has been acquired, and that the verdict for the defendant was correct. This is in accord with *Lehigh Valley R.R. Co.* v. *McFarlan*, 43 N.J.L. 605, the case in which the matter has been most fully discussed, and which has been lately followed by *Jordan* v. *Lang*, 22 S. C. 159.

*Exceptions overruled.*

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## LECTURE NOTES.

LARCENY. — (*From Prof. Thayer's Lectures.*) — In Middleton's case[1] it was decided that one who receives money offered him by a mistake not caused by him, and knowing that the money is not his, is guilty of larceny. As to the reason for the decision, all that can be said is that, on one ground and another, the majority held this doctrine. Seven out of the fifteen judges before whom the case was argued, and of the eleven who composed the majority of the court, held that it was larceny because the title did not pass.

But this case does not support that doctrine. I have always been inclined to think the opinion of the minority the sound one, — that it was no crime.

In Ashwell's case[2] the verdict was directed by the court, that the case might be reserved, and was sustained simply because the court above were equally divided. There was no question of agency or of power to pass title. Though there was mistake, yet the owner intended to hand that coin to that particular person; and it is a reason-

[1] *Queen* v. *Middleton*, L. R. 2 C. C. R. 38.

[2] *Queen* v. *Ashwell*, 16 Q. B. D. 190.